

**STATEMENT OF
ZACHARY HEARN, DEPUTY DIRECTOR FOR CLAIMS,
VETERANS AFFAIRS AND REHABILITATION DIVISION
THE AMERICAN LEGION
BEFORE THE
SUBCOMMITTEE ON DISABILITY ASSISTANCE AND MEMORIAL AFFAIRS
COMMITTEE ON VETERANS' AFFAIRS
UNITED STATES HOUSE OF REPRESENTATIVES
ON
PENDING LEGISLATION**

APRIL 14, 2015

Chairman Abraham, Ranking Member Titus, and distinguished members of the subcommittee, on behalf of our National Commander, Michael Helm, and the 2.3 million members of The American Legion, we thank you for this opportunity to testify regarding The American Legion's positions on pending legislation before this subcommittee.

H.R. 675: The Veterans' Compensation Cost-of-Living Adjustment Act of 2015

To increase, effective as of December 1, 2015, the rates of compensation for veterans with service-connected disabilities and the rates of dependency and indemnity compensation for the survivors of certain disabled veterans, and for other purposes.

H.R. 675 will provide a Cost of Living Allowance (COLA) effective December 1, 2015. Disability compensation and pension benefits awarded by the Department of Veterans Affairs (VA) are designed to compensate veterans for medical conditions due to service or who earn below an income threshold. With annual increases to costs of living, it is only appropriate that veterans' benefits increase commensurate with those increases.

For nearly 100 years, The American Legion has advocated on behalf of our nation's veterans, to include the awarding of disability benefits associated with chronic medical conditions that manifest related to selfless service to this nation. Annually, veterans and their family members are subjects in the debate regarding the annual cost of living adjustment (COLA) for these disability benefits. For these veterans and their family members, COLA is not simply an acronym or a minor adjustment in benefits; instead, it is a tangible benefit that meets the needs of the increasing costs of living in a nation that they bravely defended.

H.R. 675 is designed to allow for a COLA for VA disability benefits. The American Legion supports legislation "*to provide a periodic cost-of-living adjustment increase and to increase the monthly rates of disability compensation.*"¹

¹ American Legion Resolution No. 18:

<http://archive.legion.org/bitstream/handle/123456789/3524/2014N018.pdf?sequence=1>

Within Section 2 of the bill, it is noted that “*each dollar amount increased under paragraph (1), if not a whole dollar amount, shall be rounded to the next lower whole dollar amount.*” The American Legion does not support the rounding down of any benefit; through rounding down the benefit, the veterans’ benefits are diluted.

In order for The American Legion to support H.R. 675 The American Legion asks for Congress to remove Section 2 of the bill and allow for veterans to receive the full benefits awarded due to their service.

H.R 677: American Heroes COLA Act of 2015

To amend title 38, United States Code, to provide for annual cost-of-living adjustments to be made automatically by law each year in the rates of disability compensation for veterans with service-connected disabilities and the rates of dependency and indemnity compensation for survivors of certain service-connected disabled veterans.

According to a February 2015 press release issued by Congressman Ralph Abraham, M.D., and Congresswoman Dina Titus, this act will “*authorize the Secretary of the VA to provide an automatic annual increase to the rates of veterans’ disability compensation for surviving spouses and children based on the Consumer Price Index Urban Wage Earners and Clerical Workers.*”

In recent years, Congress has been attempting to establish an automatic mechanism to provide an annual increase in veterans’ disability benefits. The American Legion understands and appreciates the efforts to remove the veteran community from the political debate in determining appropriate annual adjustments to Cost Of Living Adjustment (COLA) amounts for disability benefits. Unfortunately, while this bill would likely promote expediency, it could also come with a significant cost to our nation’s veterans.

In December 2012, a similar bill had been proposed linking COLA for VA disability benefits to the Chained-Consumer Priced Index (C-CPI). American Legion Past National Commander James E. Koutz during the discussion of the bill noted that the current COLA formula “*already understates the true cost-of-living increases faced by seniors and people with disabilities.*”

According to calculations, “*a 30-year-old veteran of the Iraq or Afghanistan war who has no children and is 100 percent disabled would likely lose about \$100,000 in disability compensation by age 75 (calculated in today’s dollars), compared with benefits under the current cost-of-living formula. Over a 10-year period, 23 million veterans would lose \$17 billion in compensation and pension benefits.*”²

The American Legion opposes “*any legislative efforts to automatically index such cost-of-living adjustments to the cost-of-living adjustment authorized for Social Security recipients, non-service connected disability recipients and death pension beneficiaries*”³. The reasoning behind this objection is that veterans sometimes have needs and expenses which should be considered

² AARP Bulletin- March 2013: “Chained CPI Change Could Hit Veterans’ Benefits” <http://www.aarp.org/politics-society/advocacy/info-03-2013/changing-the-benefits-formula-could-hit-veterans-hard.html>

³ American Legion Resolution No. 18: <http://archive.legion.org/bitstream/handle/123456789/3524/2014N018.pdf?sequence=1>

on their own merits, rather than being simply lumped in with Social Security for simple expediency. Additionally, The American Legion “*expresses strong opposition to using any Consumer Price Index that would reduce the annual cost-of-living adjustment for military retirees, veterans receiving Social Security benefits or Department of Veterans Affairs beneficiaries.*”⁴

The American Legion opposes H.R 677

H.R. 732: Veterans Access to Speedy Review Act

To amend title 38, United States Code, to improve the opportunity for Veterans to use video conferencing for hearings before the Board of Veterans’ Appeals.

When electing to appeal a claim to the Board of Veterans’ Appeals (BVA), often veterans are blindly selecting their method of appeal. Currently veterans are presented with the following options:

- The preparation of a written informal hearing presentation by the veteran’s power-of-attorney (POA)
- Video conference hearing from a VA facility with a veterans’ law judge (VLJ) in Washington, D.C.
- Travel board hearing that requires the judge to travel to the veteran’s local regional office (RO)
- BVA hearing in Washington, D.C.

According to the April 6, 2015, VA Monday Morning Workload Report, 295,601 claims appeals are awaiting adjudication. On April 5, 2010, VA reported having 189,346 appeals awaiting adjudication. In five years, VA’s inventory has grown by over 56 percent.

Unless a veteran speaks with a knowledgeable accredited representative or contacts VA, the veteran is unsure of what method is the most expeditious to schedule a hearing.

For veterans that want a hearing before a VLJ, this bill will allow veterans to have a hearing conducted in the most expeditious method available. In January 2015, The American Legion testified that the average veteran is waiting longer for an appealed claim to be adjudicated than the standard four year military enlistment.

It is noted within the bill that if a veteran desires to have a different format for a hearing than the BVA selected, the veteran may request the change and VA shall grant the request. Through this language the veteran maintains ownership of the appeal and the method the appeal is heard.

The American Legion has over 3,000 accredited representatives located throughout the nation. No matter the zip code or time zone where the accredited representative’s advocate for veterans,

⁴ American Legion Resolution No. 291:

<http://archive.legion.org/bitstream/handle/123456789/3612/2014N291.pdf?sequence=1>

one of the greatest complaints is the wait time associated with the appeals process. While this bill will not eliminate the exploding appeals inventory, it should assist veterans in having their claims before a Veterans Law Judge (VLJ) and avoid long appellate delays.

The American Legion supports H.R. 732

H.R. 800: Express Appeals Act

To direct the Secretary of Veterans Affairs to carry out a pilot program to provide veterans the option of using an alternative appeals process to more quickly determine claims for disability compensation.

This act, while well-intentioned, may ultimately have a negative impact upon veterans. Under the current proposal, veterans will have the option to elect to pursue a claim in a “*fully developed appeal (FDA)*” format. Through electing to have a claim adjudicated via FDA, a veteran opts to not submit any additional evidence for the record following the submission of the Notice of Disagreement (NOD).

The “*Express Appeals Act*” is designed to expedite the appellate process within VA. With a growing inventory of claims, VA and veterans service organizations (VSOs) have been working to discover a program that reduces the amount of time that veterans wait to have an appealed claim adjudicated.

In order for a veteran to receive benefits for a service connection condition, the following criteria must be met:

- A current diagnosis (exception: Gulf War Illness)
- An incident in service
- A nexus statement linking the current condition to either service or a previously service connected condition

Unfortunately, VA adjudication letters are often incomplete and unclear to veterans. They are uncertain why they were denied benefits; more importantly, they often do not know what information is needed to successfully overturn the previous decision by the VA regional office. Through passage of H.R. 732, VA will be compelled to find the most expeditious means to adjudicate an appealed claim. The American Legion strongly supports increased transparency in the adjudication of claims.⁵

The current bill could allow the following to occur:

- Veteran receives decision denying the benefit with little explanation regarding how VA arrived at its denial
- Veteran elects to appeal via FDA
- Veteran is denied the benefit sought at the BVA due to not knowing what information to submit

⁵ Resolution No. 128 – AUG 2014

While decisions at the VA regional offices are lacking regarding how a claim is decided, Board of Veterans Appeal (BVA) decisions are lengthy and filled with language common in the legal profession, however, it is confusing to veterans who have no legal background. Ultimately, a veteran could file a claim, have it denied at a VA regional office, utilize the appellate process and have a claim adjudicated at BVA meanwhile having little or no understanding of why the claim was denied.

The American Legion believes the FDA program is a program that with some adjustments could hold value. Discussions between The American Legion and VA have occurred regarding the adequacy of the adjudication notification letters. VA Secretary Robert McDonald has agreed to formulate a group of concerned veteran's service organizations to draft a letter to create an adjudication notification that properly advises veterans of the information needed to gain service connection for the condition.

The American Legion is working closely with VA and other VSOs to develop an appeals process that is expeditious meanwhile not shortcutting veterans' due process rights. The American Legion could support this legislation provided the working group makes helpful and productive changes to the notification letter process.

The American Legion could support this legislation, provided it follows the caveats mentioned above.

H.R. 1067: U.S Courts of Appeals for Veterans Claims Reform Act

To amend title 38, United States Code, to extend the temporary expansion of the United States Court of Appeals for Veterans Claims, to ensure that judges of the United States Court of Appeals for Veterans Claims may enroll in the Federal Employee Group Life Insurance program, and for other purposes.

This bill addresses several aspects of the U.S. Court of Appeals for Veterans Claims (CAVC). Remarks here will be limited to the provision regarding extending the temporary expansion of the number of judges.

The Court is authorized seven permanent, active Judges, and two additional Judges as part of a past temporary expansion provision. Over the next two years a sequence of retirements risks resulting in the Court falling to just five judges right when a new administration and Congress have a thousand other nominations to worry about. Past history tells us that it will take at least two years before anyone notices that the Court is drowning. With the Board growing and its output going up to levels not seen since the Court was created, the CAVC will be in big trouble if allowed to fall to five judges for multiple years. Therefore, this needs to be addressed this year.

The American Legion has a long history of supporting the Court and it would be a great disservice to veterans and the Court to not address this now.

The American Legion supports that part of H.R. 1067 extending the temporary expansion of judges; we do not have a position on the other provisions in the bill.

H.R. 1331: Quicker Veterans Benefits Delivery Act of 2015

To amend title 38, United States Code, to improve the treatment of medical evidence provided by non-Department of Veterans Affairs medical professionals in support of claims for disability compensation under the laws administered by the Secretary of Veterans Affairs, and for other purposes.

Many veterans will submit private medical evidence to support their claims for disability benefits. For veterans that require additional medical review or do not provide a statement from a medical professional linking a medical condition to military service, VA provides compensation and pension (C&P) examinations to determine the linkage or severity of medical conditions.

The American Legion has conducted Regional Office Action Review (ROAR) visits for approximately 20 years. Through these visits The American Legion determined and reported to Congress that VA has had instances of scheduling unnecessary and duplicative examinations despite the necessary evidence existing to grant the benefit. This adds further complication to an already complicated process.

The American Legion understands that there are occasions where a veteran would need a second examination after submitting a medical nexus statement. If a private medical provider did not use a VA disability medical questionnaire, then it stands to reason that the provider may not have conducted the necessary tests to accurately rate the veteran.

Unfortunately, these instances did not get noticed solely during ROAR visits. They are noticed far too frequently by American Legion representatives at the Board of Veterans' Appeals. There have been occasions where veterans have been seeking total disability based on individual unemployability (TDIU) benefits. Meanwhile, the veteran had previously been granted Social Security disability benefits for a condition incurred in service and service connected by VA. Despite enduring medical examinations for Social Security purposes and having the benefit granted by the agency, VA would conduct their own examinations to determine the veteran's employability. Some in the veteran community refer to this needless development of disability claims as "developing to deny".

Through passing H.R. 1331, VA would be compelled to release data regarding acceptable clinical evidence and increase transparency regarding the manner claims are developed and ultimately adjudicated. Having Congressional and VA focus upon the manner that private medical evidence is treated, The American Legion believes that the treatment of the evidence received from private medical providers would receive higher consideration. Moreover, this could expedite the adjudication process and increase the overall transparency of the claims process.⁶

The American Legion supports H.R. 1331

⁶ Resolution No. 128 – AUG 2014

H.R. 1379

To amend title 38, United States Code, to authorize the Board of Veterans' Appeals to develop evidence in appeal cases, and for other purposes

Reviewing thousands of claims decided at the Board of Veterans Appeals (BVA) The American Legion finds approximately half of these claims will be remanded due to being inadequately developed and prematurely denied by the VA regional offices. As a result, BVA judges direct the Appeals Management Center (AMC) to conduct the necessary claim development which often requires scheduling additional medical examinations, retrieving required federal documentation or other necessities to fulfill VA's duty to assist.

Under the current structure, any development required by BVA is conducted by the Appeals Management Center (AMC). While BVA is independent of the Veterans Benefits Administration (VBA), AMC remains under VBA authority. Despite BVA judges providing clear guidance to AMC on how a claim should be developed, the unfortunate truth is that veterans will have claims remanded on multiple occasions for not properly developing the claim. For veterans and advocates it is extremely frustrating that AMC personnel are routinely unable to fulfill the clear instructions given by the BVA judges. One can sense the frustration of BVA judges in their instructions; it is not uncommon for a judge to note that a particular claim has been remanded on previous occasions. Furthermore, to stress the need to follow these instructions, BVA judges will often indicate the instruction in bold and italicize the font. Without question, the frustration is palpable.

This organization creates an awkward relationship of having BVA direct a VBA agency to conduct the work it deems necessary to have a veteran's claim adequately developed. BVA judges must rely upon VBA employees to conduct the development it notes is needed to fulfill VA's duty to assist. Through BVA inheriting AMC, they could provide the necessary training and oversight to AMC employees.

The American Legion notes within the bill that BVA will no longer be permitted to remand claims for further development; instead, since AMC would fall under BVA's direction, the development would occur prior to a formal decision. We believe that BVA's data regarding grants, remands, and denials are a valuable tool; as a result, we ask that BVA remain required to supply data regarding the number of claims that require additional development upon reaching the BVA by the VA regional office that submits the data. Additionally, we ask that BVA provide this information to the public in a format similar to the Monday Morning Workload Report to gain a fuller understanding of the appeals inventory and accuracy of decisions by the VA regional offices.

A restructure of this level raises many questions. As such, The American Legion is still reviewing whether or not this move would be best for veterans. It has the potential, certainly, to improve the remand process, but a change of this scale could have unanticipated consequences, and thus careful consultation with The American Legion's members and service officers is needed to develop a resolution which would support or oppose such a move. The American Legion will continue to communicate with Congress and the VA as we work to develop a position on such a move.

The American Legion has no position on H.R. 1379

H.R. 1414: Pay As You Rate Act

To direct the Secretary to make interim payments of disability compensation benefits for certain claims for such compensation prior to the adjudication of such claims, and for other purposes.

Veterans seeking disability benefits often seek benefits for more than one issue. An NBC news report from December 2012 stated 45 percent of veterans serving in the Iraq and Afghanistan conflicts are filing for disability benefits. Additionally, on average they are seeking service connection for 8-10 medical conditions, over twice as many conditions than Vietnam veterans.⁷

According to the VA's M21-1MR, Part III, Subpart IV, Chapter 6, Section A, notes:

*Except as stated in M21-1MR, Part III, Subpart iv, 6.A.1.b, decide every issue for which sufficient evidence has been obtained and a benefit can be granted, including service connection at a noncompensable level, even when the issue of service connection for other disabilities or entitlement to a higher evaluation on another issue must be deferred.*⁸

H.R. 1414 is addressing an issue that already exists within VA's manual for adjudicating claims. While VA may address the issue in the manual, unfortunately it does not universally employ its intent in the adjudication of claims. According to the April 6, 2015, VA Monday Morning Workload Report, over 461,000 veterans are awaiting a decision; 40.9 percent of those veterans have been waiting in excess of 125 days.

Through passage of this bill, VA will be able to deliver the benefits in a more expeditious manner to the veterans. Congress is reminded that through this money in the veteran's bank account is not the only result. Veterans suffering from debilitating conditions can begin to receive care for those conditions and either manage or improve the conditions that confront them. The American Legion supports legislation to grant benefits as they have been adjudicated.

The American Legion supports efforts by Congress to establish interim benefits for veterans awaiting action on claims.⁹

The American Legion supports the HR 1414

H.R. 1569

To amend title 38, United States Code, to clarify that the estate of a deceased veteran may receive certain accrued benefits upon the death of the veteran, and for other purposes

⁷ NBC News: "Disability-compensation claims for veterans lag as 'VA backlog' worsens"
<http://usnews.nbcnews.com/news/2012/12/04/15652938-disability-compensation-claims-for-veterans-lag-as-va-backlog-worsens?lite>

⁸ U.S. Department of Veterans Affairs: M21-MR Part 1. Claimants Rights and Responsibilities:
http://www.benefits.va.gov/WARMS/M21_1mr1.asp

⁹ Resolution No. 202 – AUG 2014

The American Legion has no position on the bill

H.R. 1607

To amend title 38, United States code, to improve the disability compensation evaluation procedure of the Secretary of Veterans Affairs for veterans with mental health conditions related to military sexual trauma, and for other purposes.

In early 2014, the Department of Defense (DoD) requested the RAND National Defense Research Institute to conduct an independent survey associated with military sexual assaults and gender discrimination occurring in the military.

The RAND report discovered the following findings:

- 20,000 of the 1.3 million servicemembers were the victims of at least one or more sexual assaults in the past year
- An estimated 26 percent of women and 7 percent of men on active duty experienced gender discrimination or sexual harassment in the past year
- There were significant differences in rates of sexual assaults and sex-based military equal opportunity (MEO) violations by branches of service¹⁰

It has been noted in recent years that DOD's monitoring and adjudication of sexual assaults in the military ranks has been woefully inadequate. No person that is volunteering to serve their nation should have to worry about an assault by enemy forces meanwhile having concerns regarding their safety around their fellow service members.

Because of the nature of DOD's historical response to military sexual assaults, many victims fear approaching their leaders regarding the assault. Many assaults are unreported to proper authorities; in other instances leaders within the servicemembers unit do not properly conduct a thorough investigation regarding the event. Due to this fact, it becomes far more difficult for military sexual assault victims to successfully gain disability benefits related to assaults.

During The American Legion's Veterans Crisis Command Center (VCCC) conducted in August 2014, accredited representatives witnessed first-hand the long term effects of an individual suffering from the effects of military sexual trauma (MST). During the event, a woman approached The American Legion regarding benefits associated with MST suffered during her enlistment in the Marine Corps. Approximately 25 years ago, she had been raped and had reported the event to her superiors. She indicated that no action was taken on the aggressor and lived in fear for the remaining years of her enlistment. No record of the event existed in her military records; upon attempting to gain access to VA benefits that was associated with the rape.

¹⁰ Rand Corporation: "Sexual Assault and Sexual Harassment in the U.S. Military, Top-Line Estimates for Active-Duty Service Members from the 2014 RAND Military Workplace Study"
http://www.rand.org/pubs/research_reports/RR870.html

For 25 years, the woman lived with the lingering effects and never received compensation benefits or health care for MST. She stated she could not “*shake the feeling*”; it was truly heart-breaking. Due to the careful advocacy of The American Legion and the relationship with VA personnel at the Winston-Salem VA regional office, we were able to secure these benefits. Despite having a large retroactive payment and the knowledge that she would be receiving a sizable compensation payment monthly, her joy was not in the dollars in her bank account. Her first response was a simple question, “*Does this mean that I can now get medical treatment for this?*”

In a letter to Representative Dina Titus, Past National Commander Dan Dellinger stated, “*The American Legion is deeply concerned with the lingering effects of MST, a devastating event affecting thousands of brave men and women serving in the armed forces.*” The American Legion urges VA to “*review military personnel files in all MST claims and apply reduced criteria to MST-related PTSD to match that of combat-related PTSD.*”¹¹

The American Legion supports HR 1607

Conclusion

As always, The American Legion thanks this subcommittee for the opportunity to explain the position of the 2.3 million veteran members of this organization.

For additional information regarding this testimony, please contact Mr. Warren J. Goldstein at The American Legion’s Legislative Division at (202) 861-2700 or wgoldstein@legion.org.

¹¹ Resolution No. 67 AUG 2014